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BEFORE THE TENNESSEE REGULATORY AUTHORITY
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November 22, 2004 T.R.A. DOCKET ROOM

IN RE Petition for Exemption of Certain) Docket No. 03-00391
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**POST-HEARING BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH
CENTRAL STATES, LLC**

AT&T Communications of the South Central States, LLC ("AT&T") submits the following Post-Hearing Brief in the above-captioned docket.

SUMMARY

The Petition for Exemption filed by BellSouth and Citizens asks the Tennessee Regulatory Authority ("TRA" or "Authority") to "deregulate" PRI service, pursuant to T.C.A. § 65-5-208(b), which states that the Authority may exempt a telecommunications service from part or all of the regulatory requirements set forth in § 65-5-201 through 213 if the Authority finds that competition "is an effective regulator of the price of those services." In support of the petition, BellSouth, and Sprint, an intervenor in the case, offered only second-hand and anecdotal testimony, based on advertisements, web sites, and situations in which BellSouth and Sprint lost bids for PRI service to other carriers. BellSouth and Sprint have offered no direct evidence of the extent of competition in the PRI market. Neither carrier attempted even to estimate the share of the market controlled by the incumbents as opposed to the share controlled by competitors. In the absence of any such evidence, the petition clearly is

premature and thus, should be denied. Indeed, it is difficult to believe that BellSouth and Sprint can expect the TRA to make a finding that competition “is an effective regulator of the price” of PRI service without a shred of hard evidence regarding the extent of competition in the PRI market.

DISCUSSION

I. BellSouth’s PRI Exemption Petition should be denied because BellSouth failed to offer any proof that competition exists so as to justify such an exemption.

Under T.C.A. § 65-5-208 (b), the authority shall “exempt a telecommunications service for which *existing and potential competition is an effective regulator of the price of those services.*” T.C.A. § 65-5-208 (Emphasis added). While the statute is silent as to what type of evidence would suffice in demonstrating that competition exists so as to warrant an exemption, *some* kind of evidence obviously must be presented. Contrary to the arguments of BellSouth and Sprint, however, the most obvious source of evidence is a market study showing BellSouth’s PRI market share. In the words of Consumer Advocate witness Terry Buckner, “Relative market share strength of competitors is a critical threshold consideration for PRI ISDN service to be exempt from regulation. Price can be effectively regulated by competition only if there is a viable and sustainable competitive marketplace that consists of independent market entrants.” Rebuttal Testimony of Terry Buckner, p. 2.

In the context of antitrust law, a useful reference for the Authority, courts have used the following definitions with regards to determining whether a monopoly exists or whether there is actual competition within a particular market or industry, “Monopoly power is generally defined as the power to control prices or to exclude competition, United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L Ed. 1264 (1956), and *the*

size of market share is a primary determinant of whether monopoly power exists, United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945).” PA. Dental Ass’n v. Medical Serv. Ass’n of PA., 745 F.2d 248, 260 (3rd Cir. 1984) (emphasis added); See also Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 201 (3rd Cir. 1992). Such evidence is lacking here.

Both BellSouth and Sprint argue that market studies are subjective and unreliable. See Rebuttal Testimony of Kathy K. Blake, p. 7 (“To show market power, the size of the entire pie must be shown, and no party in this docket has professed to have knowledge as to the size of the entire pie.”); Rebuttal Testimony of Brian K. Stairhr, p. 15 (“[A]ny specific market share number is completely subjective. And any market share number reflects the choices customers have made, rather than the level of competition that exists. And any market share number may or may not represent an ability to control the exercising of market power. For these reasons, identifying some specific market percentage as a threshold is unnecessary and arbitrary....”)

Further, both BellSouth and Sprint assert that one reason defining the market is so difficult is that other modes of communication must be considered. Rebuttal Testimony of Kathy Blake, p. 7 (“Due to the increase in intermodal competition from non-wireline providers (cable, wireless, and VoIP), neither BellSouth nor AT&T can determine market share for the total PRI market.”); Rebuttal Testimony of Brian Staihr, p. 10 (“A market will be defined incorrectly if it does not include all potential substitutes.”)

As AT&T witness Mark Argenbright testified, however, the services suggested as substitutes, such as DS1 and DSL, are not in fact appropriate substitutes. Mr. Argenbright

testified that DSL is not a direct substitute for PRI service explaining that, “[T]he call control and management capability provided via PRI service are not available with a DSL. Accordingly, any customer that requires the functionality provided by the out-of-band signaling associated with PRI will need to purchase a PRI as a DSL cannot provide these features.” Direct Testimony of Mark Argenbright, p. 7. Mr. Argenbright further testified that DSL is not a substitute for PRI service -- “DSL is most valuable as a means to access the Internet. PRI on the other hand provides both data and voice capabilities and is favored by those customers that are utilizing both voice and data within their networks. Accordingly, the only time DSL could be viewed as a substitute for PRI is for those customers that are seeking only Internet access.” Id.

As the antitrust cases discussed above show, market share is used as a matter of course in determining the existence or state of competition in a market. While market share may be affected by how broadly or narrowly the market is defined, market share is nonetheless an integral part of determining whether competition exists. As explained by Mr. Argenbright, BellSouth offered has no real proof that there is in fact competition, or the potential for competition, in the PRI service market. Mr. Argenbright testified that,

BellSouth ... indicates that there are 11 other companies known to offer PRI service in Tennessee. No effort, however, is made to establish the market share of its competitors. Rather, BellSouth relies on a simple count of carriers that purport to offer PRI service and even with that, it is not clear that all of these carriers offer PRI service in BellSouth's operating territory in Tennessee. *Such a feeble analysis provides no insight into the actual or potential level of competition faced by BellSouth for PRI service.*

Direct Testimony of Mark Argenbright, p. 4 (Emphasis added).

BellSouth and Sprint cannot avoid presenting any actual probative evidence justifying an exemption from regulation simply by telling the Authority the evidence is hard to put together. Some evidence must be presented that shows actual competition exists or at least has the potential to exist. If the Authority is going to grant BellSouth's request for a PRI exemption, a decision that will no doubt have a significant impact on competing companies, the Authority must base that decision on *actual evidence* of competition. To act otherwise, would thwart the legislative purpose behind the statute.

II. BellSouth's PRI Exemption Petition should be denied because BellSouth already has sufficient pricing flexibility in the form of CSAs.

BellSouth and Sprint also argue that the existence of CSAs for PRI service is clear evidence that there is competition in the PRI service market. Direct Testimony of Kathy Blake, p. 5; Direct Testimony of David Marshall, p. 3. According to BellSouth witness Kathy Blake, "BellSouth's own sales experience in the context of negotiated contract service arrangements (CSAs) supports its view of the competitive nature of PRI service in Tennessee." Direct Testimony of Kathy Blake, p. 5. Sprint witness David Marshall testified that, "UTSE observes KMC [a CLEC] aggressively competing for ISDN-PRI customers in terms of pricing and marketing/sales efforts such that UTSE estimates it loses more than 50% of head-to-head bids to KMC." Direct Testimony of David Marshall, p. 3.

The fact that BellSouth and Sprint utilize CSAs, however, does not necessarily lead to the conclusion that there is real competition in the PRI service market. Rather, the fact that BellSouth and Sprint may utilize CSAs to sell PRI service means that the companies already

have sufficient pricing flexibility in the PRI service market. As explained by AT&T witness Mark Argenbright,

CSAs are presumptively valid, effective upon filing, with the result that BellSouth can enter into an agreement with a customer without regulatory delay. Because the CSA statute provides pricing flexibility and exempts BellSouth from the prohibition against price discrimination, BellSouth is able to negotiate and offer services based on competitive market conditions ... The current level of regulatory flexibility enjoyed by BellSouth via the use of CSAs should be adequate to ensure that the dominant provider of PRI service is able to meet the demands of the market.

Direct Testimony of Mark E. Argenbright, pp. 9-10 (footnote citation omitted). Because BellSouth still enjoys its position as the dominant provider of PRI service, the flexibility offered by CSAs is more than enough to help BellSouth survive the perceived threat of competition.

III. BellSouth's PRI Exemption Petition should be denied because granting the petition will stifle the growth of new technologies such as VOIP.

As set out in AT&T's testimony, PRI circuits are an invaluable component of provisioning VoIP. According to Mr. Argenbright, "VoIP providers are yet another example of customers that utilize PRI circuits. In fact, PRI circuits are *required* for the transmission path between the VoIP provider's gateway and the Public Switched Telephone Network ('PSTN')." Direct Testimony of Mark Argenbright, p. 5 (emphasis added). Mr. Argenbright further testified that, "Without the use of a PRI circuit, VoIP calls could not interface with the PSTN with any degree of accuracy or quality." *Id.* at 6.

These concerns are echoed in the testimony submitted on behalf of the Consumer Advocate Division. Consumer Advocate witness Steve Brown testified that, "[I]t

reasonable to see the petitioners request to deregulate PRI as a strategic effort in Tennessee to counter the use of PRI as a platform for VoIP, a service that would directly compete with the petitioners' bread-and-butter service, POTS." Direct Testimony of Steve Brown, p. 5.

Interestingly, BellSouth, in discussing market share, cites VoIP as being part of the "increase in intermodal competition". Rebuttal Testimony of Kathy Blake, p. 7. It is difficult to see how BellSouth can argue that VoIP is part of the reason there is now competition in the PRI service market, while at the same time, fail to acknowledge that deregulating PRI service could easily halt the growth of VoIP. Because PRI circuits are needed in order for competitors to even provide VoIP, if PRI is deregulated, it would follow that BellSouth, as well as Sprint, could price PRI so as to eliminate the threat of VoIP. Thus, BellSouth is basically asking the Authority to take VoIP into account when determining whether there is competition and then make a decision that could significantly impact VoIP's ability to be part of that competition.

Sprint takes an entirely different approach in addressing the crucial issue of VoIP—it does not address the issue at all. In his rebuttal testimony, Mr. Staihr states that, "The issue [of VoIP] presented by the CAPD and AT&T in their Direct Testimonies should not and need not be considered as part of this case. Tenn. Code Ann. § 65-5-208(b) sets out a specific criteria for the TRA to consider when a petition for exemption is received." Rebuttal Testimony of Brian Staihr, p. 25. The issue of VoIP, however, cannot be ignored. The Authority must consider the impact deregulation of PRI service would have on VoIP's development. As the Authority is charged with promoting competition in Tennessee, the Authority must consider the impact of deregulating PRI service, which, as described by

BellSouth, is a “readily available” means of provisioning VoIP. See Rebuttal Testimony of Kathy Blake, p. 3.

IV. BellSouth’s PRI Exemption Petition should be denied because BellSouth provides a significant amount of the facilities needed by CLECs to compete with BellSouth in the PRI service market, which creates a situation ripe for anti-competitive activity on the part of BellSouth.

Despite the assurances of BellSouth and Sprint, granting BellSouth’s petition will open the door for BellSouth to engage in anti-competitive behavior. As Mr. Argenbright testified, “Because BellSouth is both an integral provider of the necessary digital facility over which its competitors provision PRI and the dominant provider of the retail PRI service in the market, the conditions are ripe for BellSouth to utilize its position in an anti-competitive manner by implementing a price squeeze.” Direct Testimony of Mark Argenbright, p. 8.

Both BellSouth and Sprint dispute Mr. Argenbright’s assertions. BellSouth witness Kathy Blake dismissed the issue entirely, stating “A CLEC may buy wholesale (UNE) services from BellSouth to provide a competitive PRI service, but wholesale rates are not an issue in this proceeding. This proceeding only deals with pricing flexibility for BellSouth’s, UTSE’s, and Citizens retail PRI service.” Rebuttal Testimony of Kathy Blake, p. 3. Sprint’s witness, on the other hand, had this to say about AT&T’s testimony on the issue of a potential price squeeze:

This effective ceiling on ILEC wholesale UNE pricing [the 1996 Telecom Act’s unbundling requirements], in addition to Tenn. Code Ann. § 65-5-208 (c) and its provisions setting a retail price floor for competitive services plus generally prohibiting anti-competitive practices such as price squeezing, all act to independently prevent the abuses complained of by the CAPD and AT&T regardless of the presence or absence of the

TRA continuing to regulate the retail price ceiling of ILEC
ISDN-PRI services.

Rebuttal Testimony of Brian Staihr, p. 23.

Regardless of the testimony to the contrary, it is clear that deregulating PRI service will create opportunities for a price squeeze. While § 65-5-208(c) does set a price floor, BellSouth, Sprint, and Citizens could squeeze their competitors out of the PRI service market without necessarily violating the price floor statute.

Furthermore, while BellSouth may argue that prices for PRI services may be reduced if BellSouth is allowed to have more "retail pricing flexibility", Mr. Argenbright addressed the immediate price reductions that may occur if the exemption is granted stating that,

[W]hile such reductions may appear to resemble the result of competition, in reality the consumer benefits would be temporary as CLECs such as AT&T would ultimately not be able to offer PRI service to those customers that are not on the CLECs own loop and transport facilities ... this would preclude AT&T from making a competitive PRI offer in the majority of its service territory (which is already smaller than the territory served by BellSouth).

Direct Testimony of Mark Argenbright, p. 9. Thus, granting an exemption for PRI service at the present time, when there is no real competition, would act to ensure that there will never be any real competition in the PRI service market.

CONCLUSION

If the Authority grants BellSouth's petition, then BellSouth, as well as Citizens and Sprint, will have the power and the incentive to shut out genuine competition in the PRI service market. As Mr. Argenbright testified,

Until such time as BellSouth can demonstrate that it is no longer the dominant provider of PRI service in Tennessee and is

not in a position to engage in anti-competitive activities, the TRA should retain its regulatory authority over BellSouth's offering. Further, granting BellSouth's request at this time would put BellSouth in a position to exercise market power in conjunction with a critical input for the implementation of VoIP applications, to the detriment of this emerging service.

Direct Testimony of Mark Argenbright, pp. 10-11.

As no evidence has been presented showing that competition in the PRI service market currently exists, or has the potential to exist, the Petition for Exemption filed by BellSouth and Citizens is premature. Therefore, AT&T respectfully asks that the petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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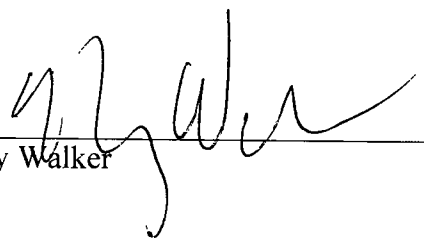
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